

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. JASON LARRY DELGADO

Appeal from the Criminal Court for Sullivan County
No. S53,101 R. Jerry Beck, Judge

No. E2008-01459-CCA-R3-CD - Filed April 24, 2009

The defendant, Jason Larry Delgado, was convicted on his guilty plea of assault, a Class A misdemeanor. See T.C.A. § 39-13-101 (2006). The trial court sentenced the defendant to serve eleven months, twenty-nine days in jail with seventy-five percent release eligibility. In this appeal, the defendant contends that the trial court erred in denying him an alternative sentence. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Stephen M. Wallace, District Public Defender, and Joseph F. Harrison, Assistant Public Defender, for the appellant, Jason Larry Delgado.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James Franklin Godwin, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was charged with aggravated assault with a deadly weapon, a Class C felony, after he injured Steven Hughes by hitting him with a champagne bottle in a barroom altercation. He pled guilty to misdemeanor assault.

At the sentencing hearing, the twenty-three-year-old defendant testified that he had been living with his girlfriend for about three years and that she was pregnant. He said that he had become unemployed about three months earlier when his employer lost his business but that he had been looking for other employment through temporary agencies. He said he was currently enrolled in a GED program at Walters State Community College. He said that he did not presently use alcohol or drugs but that he would like to receive substance abuse counseling. He admitted he had used marijuana and cocaine in the past. He said he would like to receive an alternative sentence in

order to stay home with his girlfriend and their as-yet unborn child in order to work and provide for them.

The presentence report was received as an exhibit. It reflects that the defendant had two convictions of driving on a suspended license, six drug convictions, and a trespass conviction.

The defendant argues that the trial court erred in sentencing him to serve his sentence in jail. He contends that the trial court considered only his prior criminal history and ignored his positive attributes, including his commitment to his girlfriend and their unborn child, his efforts to find a new job after his employer went out of business, his discontinuation of drug use, his desire for drug counseling, and his enrollment in a GED program.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2006). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When determining if confinement is appropriate, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006). The trial court may also consider a defendant's potential or lack of potential for rehabilitation and the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5) (2006), -210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

In the present case, the record reflects that at the time of sentencing, the defendant had several prior convictions from New York, New Jersey, and Tennessee, beginning at age sixteen. He served time in jail in New York for a drug offense and trespass, and he had New York convictions for drug offenses while he was a juvenile. He was on probation for drug possession from New Jersey at the time he committed the present offense. He had a drug conviction from Unicoi County, Tennessee, the crime having occurred after the present offense, for which he was unsuccessful on probation and was required to serve his sentence in jail.

After receiving the proof, which included the defendant's testimony about his recent efforts to lead a productive life, the trial court found that the defendant "[has] got too much prior record" for alternative sentencing and should serve his sentence in jail. The court noted, as well, that there was "[v]ery little positive in the [presentence] report." Upon de novo review, we hold that the trial court did not err in denying alternative sentencing. The defendant's criminal history, particularly

in light of his young age, is poor. His past rehabilitative efforts when sentenced to jail or probation cast doubt upon his likelihood of success if given an alternative sentence for the present conviction. The defendant's recent efforts to lead a productive life are overshadowed by his history of criminal activity and his failure to rehabilitate himself on earlier occasions.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE